UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAGE REALTY CORPORATION,

Plaintiff,

-against- 02 Civ. 0725 (LAK)

BARNHART INTERESTS, LTD., et al.,

Defendants.

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ORDER

LEWIS A. KAPLAN, *District Judge.*

According to the complaint, the plaintiff in this action is a New York real estate entity which manages a number of buildings in Manhattan for an affiliate, The William Kaufman Organization, Ltd. It owns registered service marks for "Sage Realty Corporation" and "Sage" for real estate development services. Defendants are Texas firms based in the Houston area which also engage in real estate management, leasing and development activities. The complaint alleges that defendants are engaged in willful infringement of plaintiff's "Sage" service mark, false designation of origin and false description of their services in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), violation of the New York antidilution statute, and unfair competition. The matter is before the Court on defendants' motion, pursuant to Fed. R. Civ. 12(b)(2) and (3), to dismiss the complaint for lack of personal jurisdiction and improper venue.

The plaintiff bears the burden of pleading and, if challenged, ultimately proving the existence of *in personam* jurisdiction and proper venue. The standard applicable to jurisdiction and, by parity of reasoning, venue challenges, however, depends upon the procedural context in which the challenge is made. *See, e.g., Ball v. Metallurgie Hoboken-Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990); *Mukhaddam v. Permanent Mission of Saudi Arabia*, 136 F. Supp. 2d 257, 260 (S.D.N.Y. 2001); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1351, at 248 (1990 & Supp. 2002).

"In deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981);

accord Credit Lyonnais Securities (USA), Inc. v. Alcantara, 183 F.3d 151, 153 (2d Cir. 1999); *Roberts-Gordon, LLC v. Superior Radiant Prods., Ltd.*, 85 F. Supp. 2d 202, 208 (W.D.N.Y. 2000); *Universal Marine Med. Supply, Inc. v. Lovecchio*, 8 F. Supp. 2d 214, 218 (E.D.N.Y. 1998). Plaintiff has submitted an affidavit in opposition to defendants' motion, and the Court considers this submission in conjunction with the complaint in deciding the motion.[1]

As the Court has chosen not to conduct a full-blown evidentiary hearing, the "plaintiff need make only a prima facie showing of jurisdiction thorough its own affidavits and supporting materials." *Marine Midland*, 664 F.2d at 904. "While the plaintiff will ultimately have to prove the existence of personal jurisdiction over the defendant by a preponderance of the evidence, prior to discovery, a plaintiff may defeat such a motion with legally sufficient allegations that are pleaded in good faith." *Telebyte, Inc. v. Kendaco, Inc.*, 105 F. Supp. 2d 131, 133 (E.D.N.Y. 2000) (citing *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998); *accord Ball,* 902 F.2d at 197 ("Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, *see* Fed. R. Civ. P. 11, legally sufficient allegations of jurisdiction.").

In this case, the complaint alleges no facts which, if established, would demonstrate the existence of personal jurisdiction or venue here. There is no suggestion that any of the prongs of the New York long arm statute, N.Y. CPLR § 302, is satisfied, that any defendant resides in New York, or that a substantial part of the events or omissions giving rise to the claim occurred here, *see* 28 U.S.C. § 1391(b). The complaint therefore is insufficient on its face – assuming everything plaintiff there alleges is true, there is no basis for concluding that the Court has jurisdiction over the defendants or that venue is proper in this district.

Plaintiff's affidavit does not cure the defects in the complaint. In it, plaintiff largely confines itself to complaining that it has not yet had discovery and to showing that certain entities which appear to be tenants of a Houston mall owned or operated by defendants have web sites that use the word "Sage" in describing where they are located. Plaintiff do not state in the affidavit that defendants have any contact with New York other than using the Internet to post information about and the locations of their businesses. This sort of "passive" internet activity is not sufficient to establish personal jurisdiction under C.P.L.R. § 302(a)(1). *E.g.*, *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 39-41 (S.D.N.Y. 2000); *K.C.P.L., Inc. v. Nash*, 98 Civ. 3773 (LMM), 1998 WL 8236576, at *4-5 (S.D.N.Y. Nov. 24, 1998); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 PKL AJP, 1997 WL 97097, at *10 (S.D.N.Y. Feb. 26, 1997); *see also, e.g.*, *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 28 (2d Cir. 1997) (assuming in dicta that jazz club located in Missouri that operated a promotional website accessible to computers in New York did not transact business in New York

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[1] The Court does not find an evidentiary hearing to be warranted in the circumstances, especially considering plaintiff's failure even to allege facts which, if believed, would constitute grounds for personal jurisdiction or venue. Providing plaintiff with discovery and/or a hearing at this point would be putting the proverbial cart before the horse and would relieve plaintiff of the responsibility imposed by Rule 11 to ensure that any allegations it makes are appropriately grounded in law and fact.

for purposes of Section 302(a)(1)). Because plaintiff does not contend that any of defendants' web sites were created and/or maintained in New York, Section 302(a)(2) clearly is not satisfied. *See Bensusan*, 126 F.3d at 29. Likewise, Section 302(a)(3) is not satisfied because plaintiff makes no factual allegations regarding defendants' solicitation of business in New York, their doing business in New York, their derivation of substantial revenue from goods used or consumed or services rendered in New York, their reasonable expectation of consequences in New York, or their derivation of substantial revenue from interstate or international commerce. *See* N.Y. C.P.L.R. § 302(a)(3)(i)-(ii); *see, e.g.*, *Telebyte*, 105 F. Supp. 2d at 136. Although plaintiff's affidavit states in conclusory terms that venue is proper because the harm occurred in New York, the events, acts, and omissions giving rise to the claim likely appear to have occurred in Texas. *See* 28 U.S.C. § 1391(b); *cf., e.g.*, *Bensusan*, 126 F.3d at 29 (noting that "*the acts giving rise to [plaintiff's] lawsuit*," including "the authorization and creation of [the defendant's] web site, the use of [plaintiff's trademark], and the creation of a hyperlink to [plaintiff's] web site," were performed by persons physically present in Missouri and not New York (emphasis added)).

In light of the foregoing, the motion to dismiss pursuant to Rules 12(b)(2) and (3) for lack of personal jurisdiction and improper venue is granted with leave to serve and file an amended complaint no later than April 26, 2002.

SO ORDERED.

Dated: April 18, 2002

Lewis A. Kaplan
United States District Judge